

1 EDMUND G. BROWN JR.  
Attorney General of the State of California  
2 DANE R. GILLETTE  
Chief Assistant Attorney General  
3 GERALD A. ENGLER  
Senior Assistant Attorney General  
4 JULIET B. HALEY  
Deputy Attorney General  
5 PEGGY S. RUFFRA  
Supervising Deputy Attorney General  
6 State Bar No. 117315  
455 Golden Gate Avenue, Suite 11000  
7 San Francisco, CA 94102-3664  
Telephone: (415) 703-1362  
8 Fax: (415) 703-1234  
Email: peggy.ruffra@doj.ca.gov  
9 Attorneys for Respondent

10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
12 SAN JOSE DIVISION

13 **FLORENCIO VALLEJO,**

Petitioner,

15 v.

16 **DERRAL ADAMS, Warden,**

Respondent.

C 07-4536 JSW

**MOTION TO DISMISS  
HABEAS CORPUS PETITION  
AS UNTIMELY**

19 Respondent hereby moves to dismiss the petition for writ of habeas corpus for failure to  
20 comply with the statute of limitations set forth in 28 U.S.C. § 2244(d). A motion to dismiss in lieu  
21 of an answer on the merits is proper where the petition is procedurally defective. *See White v. Lewis*,  
22 874 F.2d 599, 602 (9th Cir. 1989); *O'Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir. 1990); Rules  
23 Governing 28 U.S.C. § 2254 Cases, Rule 4, and Advisory Committee Notes.

24 We have not noticed a hearing date because petitioner is an incarcerated state prisoner who  
25 is representing himself in this case.

26 **STATEMENT OF THE CASE**

27 On November 15, 1999, petitioner pled guilty in Santa Clara County Superior Court to two  
28 counts of rape (Cal. Penal Code § 261(a)(2)), two counts of lewd and lascivious acts on a child 14-15

1 years old (Cal. Penal Code § 288(c)(1)), lewd and lascivious acts on a child (Cal. Penal Code §  
2 288(b)(1)), sodomy (Cal. Penal Code § 286(c)(2)), inflicting corporal injury on a spouse or  
3 cohabitant (Cal. Penal Code § 273.5), dissuading a witness (Cal. Penal Code § 136.1(c)(1), and  
4 misdemeanor child molestation (Cal. Penal Code § 647.6(a)). On February 25, 2000, the trial court  
5 sentenced petitioner to 40 years and four months in state prison. *See* Petition, Exh. 3, attached  
6 minute order.

7           Petitioner did not appeal. On May 22, 2000, petitioner filed a petition for writ of habeas  
8 corpus in Santa Clara County Superior Court. Petition, exh. 1. On May 26, 2000, the superior court  
9 denied the petition. *Id.*

10           On July 17, 2000, petitioner filed a late notice of appeal. Petition, exh. 2. On August 22,  
11 2000, petitioner filed an application for relief from default in the California Court of Appeal.  
12 Petition, exh. 3. On September 6, 2000, the appellate court denied the application. Petition, exh.  
13 6; Resp. Exh. A.

14           On September 14, 2000, petitioner filed a petition for writ of habeas corpus in the  
15 California Supreme Court. Petition, exh. 7. On July 25, 2001, the supreme court denied the petition.  
16 Resp. Exh. B.

17           On July 29, 2004, petitioner filed a petition for writ of habeas corpus in district court. On  
18 November 29, 2004, this Court dismissed the petition for failure to exhaust state remedies. Resp.  
19 Exh. C.

20           On November 30, 2006, petitioner filed a petition for writ of habeas corpus in the  
21 California Court of Appeal. On January 4, 2007, the appellate court denied the petition. Resp. Exh.  
22 D.

23           On January 17, 2007, petitioner attempted to file an untimely petition for review in the  
24 California Supreme Court. The clerk advised petitioner that he had submitted a defective petition  
25 and indicated he should submit an application for relief from default. Petition, exh. 8. When no  
26 application was submitted, on April 26, 2007, the court closed the case. Resp. Exh. E.

27           On August 31, 2007, petitioner filed the instant petition for writ of habeas corpus in district  
28 court. On January 8, 2008, this Court issued an Order to Show Cause.

ARGUMENT

THE PETITION IS UNTIMELY

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which imposed a one-year statute of limitations on the filing of federal habeas petitions. 28 U.S.C. § 2244(d). The limitations period commences on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). In this case, petitioner’s state judgment became final on April 25, 2000, 60 days after sentencing, when the time to file a notice of appeal expired. Cal. Rules of Court, rule 8.308(a). Thus, absent tolling, the federal petition was due by April 25, 2001. *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001).

The limitations period is tolled during the pendency of a properly filed state collateral challenge to the judgment. 28 U.S.C. § 2244(d)(2). Petitioner filed his first state collateral petition on May 22, 2000, and the statute was tolled continuously until the state supreme court denied relief on July 25, 2001, plus 30 days thereafter.<sup>1</sup> *See Carey v. Saffold*, 536 U.S. 214 (2002). Accordingly, the statutory deadline was extended by 459 days to July 28, 2002. However, petitioner did not file a federal petition by that date. His 2004 federal petition was late by two years, and also could not have tolled the statute under 28 U.S.C. § 2244(d)(2). *See Duncan v. Walker*, 533 U.S. 167, 172 (2001). His subsequent state habeas petitions were filed long after the limitations period had expired, and therefore did not toll the statute. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed”).

Accordingly, the federal petition filed in 2007 was five years late. It must be dismissed as untimely.

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1. The Ninth Circuit has interpreted California law to mean that the California Supreme Court’s summary denial of a habeas petition is not final for 30 days. *Allen v. Lewis*, 295 F.3d 1046 (9th Cir. 2002) (en banc); *Bunney v. Mitchell*, 262 F.3d 973 (9th Cir. 2001). However, effective January 1, 2003, the state rules made clear that such rulings are final immediately. Cal. Rules of Court, rule 8.532(b)(2)(C). As the ruling in petitioner’s case was before that date, he is entitled to the additional 30 days, although it ultimately does not affect the statute of limitations question.

**CONCLUSION**

Accordingly, respondent respectfully requests that the petition for writ of habeas corpus be dismissed with prejudice for failure to comply with the statute of limitations set forth at 28 U.S.C. § 2244(d).

Dated: March 4, 2008

Respectfully submitted,

EDMUND G. BROWN JR.  
Attorney General of the State of California

DANE R. GILLETTE  
Chief Assistant Attorney General

GERALD A. ENGLER  
Senior Assistant Attorney General

JULIET B. HALEY  
Deputy Attorney General

/s/ Peggy S. Ruffra  
PEGGY S. RUFFRA  
Supervising Deputy Attorney General  
Attorneys for Respondent

**EXHIBIT A**

# CALIFORNIA APPELLATE COURTS

## Case Information



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## Docket (Register of Actions)

**The People v. Vallejo**  
**Case Number H021879**

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| Date       | Description  | Notes   |
|------------|--|---|
| 08/22/2000 | Motion for relief from default filed.              | for failure to timely file a notice of appeal                                   |
| 08/24/2000 | Opposition filed.                                  | by AG to mtn for relief from default  |
| 08/25/2000 | To court.  | mtn for relief from default and opposition                                      |
| 08/28/2000 | Received document entitled:                        | Reply to Oppo to Applic for Relief from Default (tct perm to file)              |
| 08/29/2000 | Reply filed to:                                    | Oppo to Applic for Relief from Default (SDAP) (perm to file gtd by PJ)          |
| 09/06/2000 | Order filed.                                       | the application for relief from default is denied.                              |
| 09/06/2000 | Case complete.                                     |   |
| 09/15/2000 | Received copy of Supreme Court filing.             | Copy of petition for writ of habeas corpus that was filed in the supreme court. |
| 04/12/2001 | Received copy of Supreme Court filing.             | oppo by ag to petition for writ of habeas corpus.                               |
| 04/24/2001 | Received copy of Supreme Court filing.             | reply to brief in opo to petition for writ of habeas                            |
| 03/12/2003 | Filed letter from:                                 | aplnt asking for status of his case. Sent him a copy of docket sheet.           |
| 10/19/2004 | Shipped to state retention center, box # / list #: | 199/79  |

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**EXHIBIT B**

# CALIFORNIA APPELLATE COURTS

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### Docket (Register of Actions)

VALLEJO (FLORENCIO P.) ON H.C.  
Case Number **S091526**



| Date       | Description                               | Notes                                    |
|------------|---|--|
| 09/14/2000 | Petition for writ of habeas corpus filed  | petnr by counsel.                        |
| 03/27/2001 | Informal response requested               | from sf ag. due 4/11. 10 days for reply. |
| 04/11/2001 | Informal response filed                   | Attorney General                         |
| 04/20/2001 | Filed:                                    | pentr's reply to informal response       |
| 07/25/2001 | Petition for writ of habeas corpus denied |  |

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**EXHIBIT C**

CLOSED, HABEAS, ProSe

**U.S. District Court  
California Northern District (San Francisco)  
CIVIL DOCKET FOR CASE #: 3:04-cv-03090-JSW**

Vallejo v. Zavala et al  
Assigned to: Hon. Jeffrey S. White  
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 07/29/2004  
Date Terminated: 11/29/2004  
Jury Demand: None  
Nature of Suit: 530 Habeas Corpus  
(General)  
Jurisdiction: Federal Question

**Petitioner****Florencio Vallejo**

represented by **Florencio Vallejo**  
Salinas Valley State Prison  
P.O. Box 1030  
Soledad, CA 93960  
PRO SE

V.

**Respondent****G. Zavala****Respondent****The People of the State of California**

| Date Filed | # | Docket Text  |
|------------|---|--|
| 07/29/2004 | 1 | PETITION for Writ of Habeas Corpus (Filing fee \$ 5.IFPP). Filed by Florencio Vallejo. (hdj, COURT STAFF) (Filed on 7/29/2004) (Entered: 08/03/2004)                   |
| 07/29/2004 | 2 | MOTION for Leave to Proceed in forma pauperis filed by Florencio Vallejo. (hdj, COURT STAFF) (Filed on 7/29/2004) (Entered: 08/03/2004)                                |
| 07/29/2004 | 3 | CLERK'S NOTICE re completion of In Forma Pauperis affidavit or payment of filing fee due within 30 days. (hdj, COURT STAFF) (Filed on 7/29/2004) (Entered: 08/03/2004) |
| 08/09/2004 | 4 | MOTION for Leave to Proceed in forma pauperis filed by Florencio Vallejo. (hdj, COURT STAFF) (Filed on 8/9/2004) (Entered: 08/11/2004)                                 |
|            |   |  |

|            |   |  |
|------------|---|--|
| 11/29/2004 | 5 | ORDER DISMISSING Habeas Petition for Failure to Exhaust State Remedies Signed by Judge Jeffrey S. White. Denying <u>2</u> <u>4</u> Motion for Leave to Proceed in forma pauperis. (hdj, COURT STAFF) (Filed on 11/29/2004) (Entered: 12/01/2004)   |
| 11/29/2004 | 6 | JUDGMENT: The Court has dismissed this pro se petition for a writ of habeas corpus without prejudice for failure to exhaust state remedies. A judgment of dismissal is entered. The clerk shall close the file. Signed by Judge Jeffrey S. White on 11/29/04. (hdj, COURT STAFF) (Filed on 11/29/2004) (Entered: 12/01/2004) |
| 12/08/2004 |   | Mail Returned as Undeliverable. Mail sent to Florencio Vallejo. (hdj, COURT STAFF) (Filed on 12/8/2004) (Entered: 12/14/2004)  |

| PACER Service Center |               |                  |                   |
|----------------------|---------------|------------------|-------------------|
| Transaction Receipt  |               |                  |                   |
| 02/29/2008 09:13:40  |               |                  |                   |
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**EXHIBIT D**

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## Docket (Register of Actions)

In re VALLEJO on Habeas Corpus  
Case Number H030932



| Date       | Description  | Notes   |
|------------|--|---|
| 11/30/2006 | Petition for a writ of habeas corpus filed.            |   |
| 01/04/2007 | Case fully briefed.                                    |   |
| 01/04/2007 | Order denying petition filed.                          | The petition for writ of habeas corpus is denied (P, E, WD) |
| 01/04/2007 | Case complete.   |   |
| 03/07/2007 | Record purged - to be shipped to state records center. |   |

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**EXHIBIT E**

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## Docket (Register of Actions)



VALLEJO (FLORENCIO P.) ON H.C.  
Case Number **S149489**

| Date       | Description   | Notes   |
|------------|---|---|
| 01/17/2007 | Letter sent to:   | Petitioner to submit application for relief from default. (Defective petition returned with letter) |
| 04/26/2007 | No application for relief/default submitted - case closed |   |

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**DECLARATION OF SERVICE BY MAIL**

Case Name: *Florencio Vallejo v. Adams*

Case No. **C 07-4536 JSW**

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 4, 2008, I served the attached

**MOTION TO DISMISS HABEAS CORPUS PETITION AS UNTIMELY**

in the internal mail collection system at the Office of the Attorney General, 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102, for deposit in the United States Postal Service that same day in the ordinary course of business in a sealed envelope, postage fully prepaid, addressed as follows:

Florencio P. Vallejo  
P-71999  
SATF  
P.O. Box 5242  
Corcoran, CA 93212

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on March 4, 2008, at San Francisco, California.

Denise Neves

/s/ Denise Neves  
Signature